

Fair Political Practices Commission
Memorandum

To: Chairman Johnson, Commissioners Hodson, Huguenin, Leidigh, & Remy

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: March 2007 Work Plan Revisions

Date: February 22, 2007

I. INTRODUCTION

Each year the Commission approves a regulatory work plan for the next calendar year.¹ The plan provides for quarterly work plan revisions.

Attached is the regulation calendar reflecting the March updates to the 2007 regulatory work plan. This memorandum discusses staff's regulatory activity in March, as well as generally discussing the status and changes made to the calendar for the rest of the year. The numbering of the items is intended to match the numerical designation on the attached regulatory calendar.

II. ITEMS FOR MARCH

Item B7. Retention of Campaign Records: Section 84104 and regulation 18401(a)(4) provide for the maintenance of documents for an expenditure of \$25 or more, or a series of payments for a single product or service which totals \$25 or more. The documents to be retained are "cancelled checks, wire transfers, credit card charge slips, bills, receipts, invoices, statements, vouchers, and any other documents reflecting obligations incurred by the candidate, elected officer, campaign treasurer, or committee, and disbursements made from any checking or savings account, or any other campaign accounts, in any bank or other financial institution."

However, many banks no longer return cancelled checks but rather allow access to facsimiles of the checks on the web or provide copies of checks only in response to customer requests. Neither of these would satisfy the regulation language. Allow retention of electronic copies of checks in lieu of cancelled checks.

STATUS: *Proposed for Adoption.*

Item B16. Expenditures by Sponsors of Sponsored Committees: The advice letters at issue here (*Bell* Advice Letters, Nos. I-06-138 and I-06-071)

¹ See staff memorandum dated November 27, 2006, *Approval of 2007 Regulatory Priorities*.

responded to inquiries from Charles H. Bell, Jr., regarding the circumstances in which a sponsor's payments to a sponsored committee would be considered "contributions" to that committee, subject as such to the limits of section 85303(a). Specifically, Mr. Bell asked about the boundaries between payments "for the establishment and administration of a sponsored committee" – exempt from definition as contributions under regulation 18215(c)(16) – versus payments made to support committee fundraising activities. The latter payments are not exempt from the definition of "contribution" because they have not been regarded as costs of "establishment or administration" under regulation 18215(c)(16).

CHANGE: *Planned Interested Persons' Meeting. At the request of Mr. Bell, this item was advanced to an earlier date -- the interested persons' meeting will now be held in March instead of in June, with prenotice and adoption in May and July instead of August and October.*

Item C1: Regulation 18740 (Privilege): Regulation 18740 is entitled "Privileged Information: Statement of Economic Interests." Notwithstanding its broad description, this regulation is very narrowly drafted, permitting an official to omit from his or her Form 700 only "the name of a person who paid fees or made payments to a business entity if disclosure of the person's name would violate a legally recognized privilege under California law."

There have been occasions over the years where staff has found that disclosure of the location of real property owned by a public official would create physical danger, and yet on these occasions the officials could not utilize regulation 18740. Regulation 18740 should be amended to allow an exemption from disclosure of real property locations when such disclosure presents a credible threat of physical violence, whether to the official or to other persons at the location. Depending on research into the practical problems encountered by public officials, the regulation might be limited to certain kinds of officials, such as judicial officers, law enforcement personnel, and the owners of domestic violence shelters, or it could be more broadly drafted as authority for a general "physical threat" exemption.

STATUS: *Planned Interested Persons' Meeting.*

Item C2: Parcel Disclosure: Regulation 18730 governs the provisions of the conflict of interest codes, including the manner of reporting economic interests on a Statement of Economic Interests (Form 700). Specifically, regulation 18730(b)(7)(A)(3) governs the manner of reporting real property interests and allows the address *or other precise location of the real property* to be disclosed on the Form 700. This provision has been construed to allow reporting an assessor's parcel number instead of a street address.

Generally, the real property disclosure requirement is meant to provide the public with the exact location of the filer's real property interests as a means to

determine whether the filer may have a conflict of interest in making a particular governmental decision related to the property. While disclosure of an assessor's parcel number technically reveals the precise location of a property, a parcel number listed on Form 700 could instead be used as a means of concealing the property's location from members of the public who do not have the knowledge or means to take the steps necessary to determine the location of the property. This could easily thwart the intended purpose of the disclosure requirement.

The enforcement division staff therefore proposes an amendment to regulation 18730(b)(7)(A)(3) to clarify that the property address of a filer's real property interest must be disclosed, if one exists. If there is no street address, another method which accurately reflects the precise location of the real property will suffice. Thus, an alternate method indicating the precise location of the property could be used only when a street address is not available. This change will allow for full disclosure of real property interests and will provide meaningful disclosure of those interests to the members of the public. This change will also allow decisions made, participated in, or influenced by a public official, which are related to his or her property interests, to be more easily identified.

STATUS: *Planned Interested Persons' Meeting.*

Item C3. Gifts to an Agency (Regulation 18944.2): A payment is deemed to be a gift to a public agency, not a gift to a public official, if all of the following requirements are met:

- (1) The agency receives and controls the payment.
- (2) The payment is used for official agency business.
- (3) The agency, in its sole discretion, determines the specific official or officials who shall use the payment.
- (4) The agency memorializes the payment in a written public record.

Staff proposes amending regulation 18944.2(a)(1) to allow the donor to make payments directly to an airline or hotel rather than requiring that the agency receive the payment. In cases where the latter three factors are not in dispute (i.e., the trip is for agency business, the agency selects the employee to go and memorializes all of these steps in a public record), the payment may still be a gift to the assigned public employee where the donor chooses to pay a bill directly (to a hotel or for plane tickets). Staff would like to explore modification or elimination of the first factor.

STATUS: *Proposed for Adoption.*

Item C4: Item 4. Regulation 18705.1 Materiality Standard: Regulation 18705.1 sets forth the materiality standard for business entities in which a public official has an economic interest for purposes of determining whether there is a conflict of interest in a governmental decision. For business entities that are *indirectly* involved in governmental decisions, regulation 18705.1(c)(2) sets forth the relevant materiality standards with reference to the New York Stock Exchange (“NYSE”) listing requirement. That requirement was previously based on a company’s earnings for its most recent fiscal year.

Since the adoption of this regulation, the NYSE has changed its listing requirements, creating confusion as to what standard to apply.

A proposed technical amendment was presented to the Commission in October which would have mirrored the new listing requirements as set forth in the NYSE Listed Company Manual. However, the Commission asked staff to set this item as a regulation project for 2007 in hopes of fully investigating whether the NYSE standard is the preferred standard or whether a new, easier standard for the regulation should be developed.

***STATUS:** Planned Interested Persons’ Meeting.*

III. MOVED FROM MARCH

Item B1. SB 145 (Stats. 2006, Ch. 624, urgency) Murray Political Reform Act of 1974: Contributions: This bill would authorize an elected state officer to accept contributions after the date of the election to the office presently held for the purpose of paying expenses associated with holding office or for any other purpose authorized by the Act, subject to certain limitations. The bill would set limits on the amount of contributions that may be made to an elected state officer in a calendar year and on the aggregate amount of contributions that a state officer may receive in a calendar year.

***CHANGE:** The permanent adoption hearing was postponed one month to April in order to give the staff a greater opportunity to evaluate the functioning of the emergency regulations.*

IV. PROPOSED FUTURE REVISIONS

B. CAMPAIGN

Item B2. AB 1759 (Stats. 2006, Ch. 438) Umberg Campaign Expenditures Disclosures: This bill would require committees other than primarily formed committees to disclose contributions or independent expenditures totaling \$5,000 or more to support or oppose the qualification or passage of a single state ballot measure.

CHANGE: *Upon review and discussion with the Legal Division and Technical Assistance Division, staff now believes that a regulation is not necessary to detail the required disclosure because the disclosure is made clear in the statute. However, staff believes a regulation would still be useful to clarify specific circumstances when disclosure would or would not apply. Thus, the scope of this project has changed somewhat. The new statute section 84204.5 raises two issues that may require a regulation in order to clarify. Section 84204.5(a) says that a committee must file (within 10 days) each time it makes contributions or independent expenditures totaling \$5,000 or more for or against the qualification of a “single state ballot measure.” The question arises as to whether the disclosure would apply if a general purpose committee made \$10,000 in contributions to a committee primarily formed to support or oppose two ballot measures (e.g., “Yes on 79 & No on 78: A Coalition of Consumer Organizations for Affordable Prescription Drugs,” a committee that supported two measures on the November 8, 2005 special election ballot).*

Despite the fact that the ballot measure committee has been formed to support or oppose two measures, the contributing committee is still making a contribution of \$5,000 or more to support a state ballot measure, and the donor committee’s source of funding should be disclosed under section 84204.5. Staff believes that if contributions in the amount of \$10,000 are made to a committee primarily formed to support two state ballot measures that at least \$5,000 would be spent on one of the measures so that reporting is required.

Also, the situation could occur in the future where a committee is primarily formed to support or oppose the qualification of three ballot measures. Under this rationale the disclosure requirements would apply, and general purpose committees would be required to report for their contributions and expenditures for state ballot measures and their source of funding. A regulation would be useful to put the language of single state ballot measure in context.

The second question with section 84204.5 is whether it is useful to explain when the disclosure requirement applies to general purpose committees. Staff believes the disclosure requirements in section 84204.5 only apply when a general purpose committee contributes to a primarily formed state ballot committee, and not when a general purpose committee contributes to another general purpose committee. It would be helpful to state this in a regulation.

Due to this change in scope, staff proposes moving this item to a prenotice hearing in April and adoption in June.

Item B3. AB 2275 (Stats. 2006, Ch. 439) Umberg Political Reform Act of 1974: telephone advocacy: This bill requires candidates, committees, and slate mailer organizations that use campaign funds to make 500 or more phone calls in support or opposition of candidates or ballot measures to disclose the name of the organization that authorized or paid for the call unless the calls are personally made by

the candidate, campaign manager, or volunteers. The bill also requires organizations to keep a script or a copy of the recorded phone call for a period of time per regulation 18401. The bill also prohibits committees from contracting with phone bank vendors who do not conform to these disclosure requirements.

CHANGE: *This item was moved; the prenotice and adoption will now be held on in June and August instead of in February and April.*

Item B8. Defining When an Independent Expenditure is Made: Section 82025 provides that an expenditure is made the earlier of: (a) when the payment is made, or (b) when the goods or services are received. However, independent expenditures are generally “made” when the communication is made. In cases where no communication is actually sent, the independent expenditure has not been “made” for reporting purposes.

CHANGE: *Due to the need to reassign this item to a different staff person and in order to avoid conflicting projects, this item has been moved to prenotice in October and adoption in December from the original June August consideration.*

Item B15. Repeal Regulation 18530.9 or Amend with a Comment Stating that the Regulation is Currently Subject to a Preliminary Injunction. On February 8, 2005, Citizens to Save California, et al., filed a complaint for injunctive and declaratory relief in Superior Court challenging the Commission’s June 2004 adoption of regulation 18530.9. The regulation imposed contribution limits on candidate-controlled ballot measure committees (the same contribution limit applied to the controlling candidate). The court granted plaintiffs’ motion for preliminary injunction, barring the Commission from enforcing regulation 18530.9 pending final disposition of the lawsuit.

The Commission appealed, noting that the Superior Court’s injunction was stayed while the appeal was pending. The Third District Court of Appeal heard oral argument on November 17, 2006. On December 8, 2006, the Court of Appeal issued an opinion affirming the trial court’s grant of a preliminary injunction against the Commission (*Citizens to Save California vs. California Fair Political Practices Commission* (2006) 145 Cal.App.4th 736.). The proposed regulatory action would repeal regulation 18530.9 or, in the alternative, add a comment stating that the regulation is currently subject to a preliminary injunction.

NEW ITEM.

C. CONFLICT OF INTEREST DISQUALIFICATION AND DISCLOSURE

Item C5: SB 8; Revolving Door; Local Officials: Commencing July 1, 2006, local officials who held positions with certain local government agencies will be prohibited for one year after leaving office from contacting their former employer for compensation for the purpose of influencing administrative or legislative action or an action involving.

***CHANGE:** Staff brought this 2006 item back in February 2007 in order to propose clarifying revisions to regulation 18746.3 interpreting the Act's postgovernmental employment restrictions on the activities of certain local governmental officials.*

D. OTHER MISCELLANEOUS ITEMS

NO CHANGES.

Appendix 1: Regulation Calendar